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JAMES R. BR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 646

THE WANDERER

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner-Appellant Below,

versus

WILBURN BOAT COMPANY, ET AL.,
Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

	PAGE
Summary Statement of the Matter Involved	1
Basis of the Court's Jurisdiction	5
Questions Presented	5
Reasons for Granting the Writ	6
Conclusion	13
Appendix	1a
Opinion of the Court of Appeals for the Fifth Circuit	1a
Judgment Order	7a
Order Denying Petition for Rehearing	7a

Table of Authorities

Cases

Aetna Life Ins. Co. v. Smith, 293 S.W. 243, (Tex. Civ. App. 1927)	12
Berry v. Commissioner, 254 F. 2d 471, 474 (CA 9, 1957)	6, 9
Bingham v. Supervisors Winona County, 6 Minn. 136 (1861)	12
Bond v. Bond, 260 App. Div. 781; 24 N.Y.S. 2d, 169 (1940)	12
Burstein v. U. S. 232 F. 2d 19, 22 (CA 8, 1956)	6, 12
Citizens State Bank v. American Fire & Casualty Co., 198 F. 2d 57 (CA 5, 1952)	3
Cole v. State Compensation Com'r., 114 W. Va. 633; 173 S.E. 263 (1934)	12
Emerick & Duncan Co. v. Hascy, 146 Fed. 688 (CA 9. 1906)	12

PAGE

Fidelity Mutual Life Assn. v. Harris, 94 Texas 25, 57 S.W. 635, 639 (1900) 3

Gillett v. Detroit Board of Trade, 46 Mich. 309; 9 N.W. 428 (1881) 11

Gonzales v. Pacific Greyhound Lines, 34 Cal. 2d 749; 214 P. 809 (1950) 12

Greenspahn v. Joseph E. Seagram & Sons, 186 F. 2d 616, 620 (CA 2, 1951) 6, 7-8, 9

Lee v. Wharton, 11 Texas 61 (1853) 12

Lee v. Winans, 99 App. Div. 297; 90 N.Y.S. 960 (1904) 12

People v. Houser, 85 Cal. App. 2d 686; 193 P. 2d 937 (1948) 12

Texas Employers Ins. Ass'n v. Wright, 297 S.W. 764 (Tex. Civ. App. 1927); modified; other grounds 4 S.W. 2d 31 (Tex. Comm. App. 1928) 13

Villareal v. Passmore, 145 S.W. 1086, 1087 (Tex. Civ. App. 1912) 12

Weinroth v. 603 Fifth Ave. Corp., 102 N.Y.S. 2d 471 (Sup. Ct. 1951) 13

Wilburn Boat Company v. Fireman's Fund Insurance Company, 348 U.S. 310 (1955) 5

Williams v. Hirschfield, 32 Okla. 598; 122 Pac. 539 (1912) 11

CONSTITUTION AND STATUTES.

83 C.J.S. Stipulations, Sec. 25 (b) 12

Rule 31 (b) (1) Rules of Practice of the Tax Court of the United States 10

28 U. S. C. 1254 (1) 5

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Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of United States:

Petitioner, Fireman's Fund Insurance Company, respectfully shows:

Summary Statement of the Matter Involved.

The Court of Appeals notes that the parties have stipulated that the case "shall" be tried "solely" on the evidence admitted and judicial admissions made at the trial held shortly after the occurrence of ten years ago — when the evidence was fresh to support all defenses, including sub-

stantiation of the indications found in respondents' own proof that this insurance claim was based on a foul loss.[1]

At that time respondents presented no evidence sufficient to support any judgment in their favor on any theory; the Court of Appeals so holds.

Having no occasion whatever to present evidence to defeat a case that was not made, petitioner let the record close with respondents' insufficient proof. (R. 286) The Court of Appeals correctly observes that petitioner doubtless adopted its course at the trial because of the insufficiency of respondents' proof.

Upon the evidence admitted; and judicial admissions made at that trial (on which the respondents *stipulated* that this case "shall" be "solely" tried) the Court of Appeals holds that it is clear, if not conceded, that respondents cannot recover under the law of Illinois (where this insurance was sought, negotiated, completed and issued.

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[1] These include: When she was burned on February 25, 1949 (R. 110; references are to the record as certified) the vessel had been insured for $40,000.00, substantially more than the total investment therein. (R. 49) Respondents' witness familiar with vessel sales on Lake Texoma (who undertook to put a market value on her) conceded that there was actually no market for her. (R. 220) She had been pledged by respondents by successive chattel mortgages for a total of $28,000.00, all of it still unpaid (R. 112), and one of the two $10,000.00 prior lien mortgages to a bank (if not both) was recently (on January 4, 1949) past due. (R. 126)

Altered to engage in the passenger excursion business (R. 40) and used by the Wilburns and the Oklahoma corporation to which they sold her (R. 47, 113) in that traffic so far as patronage was available (R. 110) she had made only three or four trips with passengers for hire. (R. 165) She was out of use (R. 111); taken from a boat yard and afloat at mooring 300 feet off shore in Oklahoma (R. 45)—not her dock (R. 106, 111, 120)—she was then burned and sunk in the small hours of the morning of February 25, 1949. (R. 167)

See *Fidelity Mutual Life Assn.* v. *Harris*, 94 Texas 25, 57 S.W. 635, 639 (1900).) Upon that record the Court of Appeals now holds that respondents might or might not be entitled to recover under the statutory law of Texas (see *Citizens State Bank* v. *American Fire & Casualty Co.*, 198 F.2d 57 (CA-5, 1952)) but does not pass on that, the record before it being insufficient to bring the transaction within the reach of the statutory law of Texas.

Noting the stipulation of the parties that the case shall be tried solely on the evidence admitted and judicial admissions made at the first trial; and considering all other circumstances, the Court of Appeals holds that the case was in such a posture that the District Court could not "take judicial notice" that the petitioner was "doing business" within the State of Texas (which the District Court had purported to do on the basis of a copy of a "certificate of authority" to do business that had been filed with the clerk after the second trial below).

But then, although the Court of Appeals notes the stipulation of the respondents that the case shall be tried, solely, on the evidence admitted and judicial admissions made at the first trial — although respondents made no complaint whatever of the stipulation in either court — although no findings are made against the validity of the stipulation — the Court of Appeals abruptly (but not inadvertently, in view of the petition for rehearing) and without addressing itself expressly to its abrogation of the unchallenged stipulation of the parties, holds that, contrary to the unchallenged stipulation, the case shall *not* be tried solely on that evidence and those admissions, but that there shall be a new trial with new evidence, although evidence by which petitioner could have supported defenses under Texas law *is now ten years old.*

It is accordingly believed that a decisive aspect of the case that should be dispositive of this protracted litigation is now ripe for review: When the respondents with ample time for the most mature consideration and well knowing of this "certificate of authority" (they went outside the record to make a "copy" thereof an "exhibit" to their earlier brief in this Court) in order to secure to themselves advantages they sought and have fully enjoyed thereby, deliberately secured a *stipulation* that the case *shall* be tried *solely* on the evidence admitted and judicial admissions made at the first trial, and the petitioner has foreborne to put in any evidence *when the evidence was fresh and available* (first because respondents failed to make a sufficient record, and then because of that stipulation) — then may the Court of Appeals *sua sponte* abrogate the valid and unchallenged stipulation without even addressing itself to its validity and direct, contrary thereto, that the case shall *not* be tried solely on that evidence and those admissions, and thereby require the petitioner to support defenses (under a different law, clearly held inapplicable upon the record and under the stipulation) with any mere fragments of the evidence as may remain *after ten years*?

The stipulation reads:

"STIPULATION.

"It is stipulated that this case shall be tried solely on the evidence admitted and judicial admissions of fact heretofore made in this cause in this Court, on which judgment was entered on December 13, 1951.

STRASBURGER, PRICE, KELTON, MILLER & MARTIN,
GULLETT & GULLETT,
T. G. SCHIRMEYER,
By (s) ALEXANDER GULLETT,
Attorneys for Plaintiff.
LORD, BISSELL & BROOK,
KEITH & KENNEDY,
By (s) JOE A. KEITH;
Attorneys for Defendant."

The Basis of the Court's Jurisdiction.

The Court of Appeals for the Fifth Circuit entered the judgment of which review is sought on September 18, 1959, and on October 17, 1958, denied the petition for rehearing filed therein by the petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented.

1. After remand to the District Court, following this Court's earlier decision (*Wilburn Boat Company* v. *Fireman's Fund Insurance Company*, 348 U.S. 310) the cause was submitted under an express stipulation of the parties that the cause shall be tried solely on the evidence admitted and judicial admissions of fact theretofore made on the initial trial resulting in the judgment subsequently reversed by this Court. The transcript from the initial trial contained nothing, as the Court of Appeals expressly recognizes, upon which the District Court could base a finding that the respondent was doing business in the State of Texas. The Court of Appeals recognizes that without such an adequately supported finding the respondent was entitled to judgment. The occurrences in question are now ten years old as to all petitioner's defenses. On these facts the question is: may a Court of Appeals at this late date on its own motion, without request by either party, and without any consideration or request for consideration by the trial court, set aside the valid and unchallenged stipulation of the parties *sub silentio*, by remanding the case to the District Court for a new trial to consider any and all additional evidence the parties desire to present — contrary to their stipulation — and whether or not in conflict with their express stipulation?

2. May a Court of Appeals on these facts set aside such stipulation on its own motion without any request there-

for and without any finding (or evidence to support such a finding) in the trial court that (1) the respondents would suffer substantial injustice and (2) that the petitioner can be restored to the same position it would have been in if no stipulation had been made?

Reasons for Granting the Writ.

1. The decision directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Greenspahn* v. *Joseph E. Seagram & Sons*, 186 F.2d 616 (CA 2, 1951), and the decision of the Court of Appeals for the Ninth Circuit in *Berry* v. *Commissioner*, 254 F.2d 471 (CA 9, 1957). See also *Burstein* v. *U.S.*, 232 F.2d 19 (C.A. 8).

At the second trial (before a different judge) the District Court below did not purport to set aside the stipulation of the parties that the case shall be tried solely on the evidence admitted and judicial admissions made at the initial trial. Instead, the District Court purported to take judicial notice that the petitioner was doing business in Texas in June, 1949 (and that Texas law therefore applied in determining petitioner's liability on the policy) on the basis of a purported certificate of the Board of Insurance Commissioners of Texas that petitioner was qualified to write insurance in the State of Texas at that time, which certificate was never in court nor admitted in evidence during either trial, but was filed by respondents with the Clerk of the District Court long after the second trial was concluded and nearly two months after the final judgment was entered. The Court of Appeals below expressly noted that the stipulated record contains no evidence on which the Court could base a finding that petitioner was doing business in Texas. The Court of Appeals quite properly held that neither was the certificate of au-

thority filed with the Clerk evidence nor could the District Court by "judicial notice" conclude that the petitioner was actually doing business in the State of Texas.

The Court of Appeals expressly stated that *on the record before the District Court* petitioner was entitled to judgment in its favor. And the parties had expressly stipulated that *this record* and this record *only* should be considered upon the retrial. Yet the Court of Appeals reversed and remanded for a new trial at which the petitioner and respondents are to be permitted to change that record by other or further evidence on this and all other phases of the case, as to occurrences now ten years old. The Court of Appeals without being requested to do so by either party and without any showing before the trial court or the Court of Appeals against the stipulation, completely disregarded and treated as a nullity the stipulation of the parties that the case shall be tried solely on the evidence admitted and admissions made at the first trial.

In the *Greenspahn* case, *supra,* the plaintiff sued for specific performance of contracts to sell "Kentucky" whiskey. This was construed to mean whiskey manufactured by the defendant, and specific performance was granted. The defendant appealed. While this appeal was pending the plaintiff and defendant, together with several of the plaintiff's relatives (who had obtained a judgment against the defendant in a separate suit) joined in a stipulation to settle both suits, whereby the defendant agreed to perform the decree. Thereafter the defendant determined that the stipulation worked a hardship on it inasmuch as it did not have sufficient whiskey of its own distillation on hand to enable it to perform the *Greenspahn* decree, and asked (as these respondents here did not) to be relieved of their stipulation. The District Court re-

fused and the Court of Appeals affirmed, stating at page 620:

> "To obtain relief from a stipulation the moving party must show that unless relieved he will suffer a substantial injustice and that the other parties to the stipulation can be restored to the same position they would have had if no agreement had been made."

The respondents have enjoyed to the full the benefits of the stipulation in that petitioner was thereby precluded from offering at the second trial the evidence then available in support of defenses (such as that the loss of the vessel was the result of arson) which would have clearly been valid even under Texas law. There was then available to respondents any evidence now available as to whether or not the petitioner was doing business in Texas at the time the policy was issued (no claim is made, or could be made, otherwise). They preferred to forego whatever advantage they might have gained by such evidence in order to be assured that the petitioner would forego presenting its then available evidence in support of defenses. Years thereafter, the Court of Appeals, of its own motion, without even being asked to do so, relieves the respondents of their deliberate stipulation. The evidence the petitioner had at that time as to defenses is now weaker by the passage of that extended period of time. In ten years, and in two trials, respondents never made a case that required petitioner to make defenses good under Texas law. Petitioner cannot possibly be restored to the same position it would have been in had no stipulation been made. "Justice" is a two-way street; the Court of Appeals had before it no showing that substantial injustice would result if the stipulation were enforced nor that the petitioner could "be restored to the same position" it would have been in had the stipulation not been made. Nor did it have before it any evidence that the respondents would suffer "substantial in-

justice" if judgment were entered in favor of petitioner. Such action by the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Second Circuit in the *Greenspahn* case which held that it would have been error for the District Court to have set aside a stipulation without such a showing.

The decision below is also in direct conflict with the ruling of the Ninth Circuit Court of Appeals in *Berry* v. *Commissioner, supra.* In this case the issue was whether a corporate income tax return was timely filed. If the corporation was in existence during the whole of the calendar year, the return was filed within the statutory period. The parties stipulated that the corporation disposed of its assets on October 31, 1949, and ceased to do business on that date. At the trial counsel for petitioners asked to be permitted to offer testimony explaining the stipulation and to show that the corporation did not actually wind up its affairs as of October 31. The trial court admitted evidence to establish this fact. On appeal, the Court of Appeals noted that on remand the Tax Court should make clear as to how far it considered the stipulation binding, stating at page 474:

> "It is our opinion, on the one hand, that it was the responsibility of counsel for petitioner to obtain a clear ruling of the trial court setting aside or modifying the stipulation. Ordinarily, a stipulation by counsel, especially if in writing, establishes the facts absolutely. *Of a certainty it cannot be disregarded in an appellate court.* • • • There are expressions in the record which indicate that the presiding judge intended thereby to permit modification or contradiction of the written stipulation. *However, this should have been done by express modification of the instrument, if that were the intention, rather than by indirection.*" (Our emphasis)

The Court of Appeals below in this case did precisely what the Court of Appeals for the Ninth Circuit stated was improper, and worse. It set aside the stipulation on appeal. It set it aside on its own motion without any request whatever, let alone formal motion, by respondents' counsel that it be set aside. It set aside the stipulation by indirection without any express modification of the instrument. This Court should grant a writ of certiorari to review the judgment below to resolve these conflicts.

2. The effect of agreements by parties on what shall be the factual basis of decision is of importance in litigation in the federal courts. It is the policy of the law to encourage such stipulations (see, for example, Rule 31 (b) (1) of the Rules of Practice of the Tax Court of the United States) in order to make feasible the disposition of the ever-increasing flow of litigation involving a large mass of factual data. It is vital, if this policy is to succeed, that parties be assured that they will not be penalized by having an appellate court set aside such an agreement without an adequate showing of good cause, sufficient to set aside a contract generally — penalized by allowing the other party to introduce other and further evidence after having had the benefit of the stipulation for a period of time sufficient to destroy the effectiveness of the opposing party's oral testimony on matters not included in the agreed factual basis of decision.

True, the decision below runs against the great weight of authority in this field, but it does represent the considered opinion of the Court of Appeals for one of our larger circuits. This Court should review the judgment below in order to lay down definite rules for the guidance of the federal courts as to:

(1) Whether a federal court of appeals *sua sponte* may abrogate a valid stipulation of the parties — of which neither party complains — that a case shall be tried solely on the evidence admitted and judicial admissions theretofore made of record?

(2) What showing is necessary to justify relieving a party from a stipulation that the case be tried *solely* on certain evidence and admissions?

(3) Is the Court of Appeals or the trial court the proper tribunal initially to determine whether a stipulation of the parties will be abrogated?

(4) Should a tribunal making the determination to relieve a party of a stipulation be required to rule specifically on the question or may it merely disregard the agreement?

(5) Are the parties involved entitled to be heard in opposition before the stipulation is vacated?

Petitioner submits that the Court of Appeals below has answered all of these inquiries in a manner in conflict with the generally accepted rules applied by the courts (both federal and state) in this area of federal procedural law.

The general rule is that in the absence of grounds sufficient to authorize a court to set aside a stipulation, an agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them, and they will not be heard to claim that there are other facts that the Court may presume to exist. So also the Court is conclusively bound by the facts stated and must render judgment as the agreed facts, and they alone, require. *Williams* v. *Hirschfield*, 32 Okla. 598; 122 Pac. 539 (1912); *Gillett* v. *Detroit Board of Trade*, 46 Mich. 309; 9 N.W. 428

(1881); *Burstein* v. *U. S.*, 232 F.2d 19, 22 (C.A. 8, 1956). Where, as here, the stipulation purports to include the whole factual predicate upon which the case shall be tried, matters not included in the stipulation are inadmissible, *Aetna Life Ins. Co.* v. *Smith*, 293 S.W. 243, (Tex. Civ. App. 1927); 83 C.J.S. *Stipulations*, Sec. 25(b).

Similarly, it is almost universally held that a stipulation that a case shall be tried on certain facts is a contract and cannot be set aside or modified except upon a showing of facts sufficient to justify setting aside or modifying contracts generally. Such grounds include mutual mistake of fact (as where the parties agree to the truth of a given statement which actually is false), or fraud in procuring the execution of the document. *Bingham* v. *Supervisors Winona County*, 6 Minn. 136 (1861); *Lee* v. *Wimans*, 99 App. Div. 297; 90 N.Y.S. 960 (1904); *Bond* v. *Bond*, 260 App. Div. 781; 24 N.Y.S. 2d 169 (1940); *People* v. *Houser*, 85 Cal. App. 2d 686; 193 P. 2d 937 (1948); *Gonzales* v. *Pacific Greyhound Lines*, 34 Cal. 2d 749; 214 P. 2d 809 (1950); *Lee* v. *Wharton*, 11 Texas 61 (1853); *Villareal* v. *Passmore*, 145 S.W. 1086, 1087 (Tex. Civ. App. 1912).

The court will not presume such facts but requires a showing of good cause. The doctrine of the authorities is that courts will not act to set aside a stipulation of facts except upon proper application by a party. The court will not relieve a party of a stipulation merely because inadvisedly entered into even though it may operate harshly unless all the parties may be placed in the condition in which they were before the stipulation was made. *Cole* v. *State Compensation Com'r.*, 114 W. Va. 633; 173 S.E. 263 (1934); *Emerick & Duncan Co.* v. *Hasey*, 146 Fed. 688 (CA 9, 1906).

Finally, the rule generally followed is that issues involved in setting aside a stipulation are to be made, by timely request to the trial court, so that they may be determined there. *Weinroth* v. *603 Fifth Ave. Corp.*, 102 N.Y.S. 2d 471 (Sup. Ct. 1951). A reviewing court has no power so to do on its own motion, the parties being required to move in the trial court to have it corrected. *Texas Employers Ins. Assn.* v. *Wright*, 297 S.W. 764 (Tex. Civ. App. 1927), modified on other grounds 4 S.W. 2nd 31 (Tex. Comm. App. 1928).

CONCLUSION.

The action of the Court of Appeals below runs counter to all of these well established principles. The Court should hear this case to resolve the conflict and establish definite rules for the guidance of the lower federal courts in this important area of federal procedural law.

Respectfully submitted,

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Attorneys for the Petitioner-Appellant.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16945

FIREMAN'S FUND INSURANCE COMPANY,
Appellant.

versus

WILBURN BOAT COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(September 18, 1958.)

Before HUTCHESON, *Chief Judge*, and TUTTLE and BROWN, *Circuit Judges*.

BROWN, *Circuit Judge*. When this case was first here, *Wilburn Boat Co.* v. *Firemen's Fund Ins. Co.*, 5 Cir., 201 F.2d 833, 1953 AMC 284, we held that federal maritime rules were applicable to the Hull policy on the Motor Yacht WANDERER. Her destruction by fire on February 25, 1949, is the subject of this protracted litigation. The Supreme Court reversed, 348 U.S. 310, 99 L.ed. 337, 1955 AMC 467, holding that the law of some state applied.

and remanded the cause to the District Court for the determination of which state that would be, and whether under the laws of that state the claimed actions [1] by the Assureds amounted to breaches or would otherwise constitute a defense under the policy.

Inevitably this involved the basic question whether this was a Texas or an Illinois [2] contract, for it seems quite clear, if not conceded, that under Illinois law one or more of the acts, note 1, would be an absolute defense. However, under Texas law the anti-encumbrance statute [3] would make the breach of the anti-mortgage clause (see, (a), note 1, *supra*) inconsequential, and other specific Texas statutes [4] and their judicial interpretation might

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[1] The Insurer asserted that the policy was forfeited because of a breach of the (a) anti-encumbrance warranty because of admitted chattel mortgages, (b) transfer of title or interest warranty because of a transfer by the individual owners (Assureds) to their wholly owned Oklahoma corporation, (c) private, not commercial, use warranty because the boat was intended to be used in commercial charter operations on Lake Texoma, also (d) misrepresentation of the value of the boat at the time the amount of insurance was increased, and (e) fraud and concealment of the facts concerning (a), (b), (c) and (d).

[2] How Illinois came into the picture so that this became a problem may be briefly stated. The Wilburns purchased the WANDERER then laid up in Greenville, Mississippi. McKinney, a Denison insurance agent acting for Wilburns stating that he had no facilities for marine insurance, requested the Cleaveland Agency of Rock Island, Illinois, to arrange for insurance covering her movement to Lake Texoma and subsequent operation. The Cleaveland Agency, as agent for Insurer, a California corporation with a Division office in Chicago, had previously issued to the former owners a port risk cover on the vessel. On behalf of the Insurer the Rock Island agent issued the several indorsements to effectuate this insurance and forwarded them to McKinney for delivery to Wilburns. The premiums were paid by two checks of the Assureds drawn on a Texas bank payable to the Rock Island Agents to whom they were transmitted by McKinney.

[3] Tex. Rev. Stat. (1925), Art. 4890, Acts 1913, p. 195, re-enacted without change, Texas Ins. Code, Art. 5.37 Lien on Insured Property.

[4] See, e.g., Art. 4930 Tex. Rev. Stat. (1925), Acts 1913, p. 194, Tex. Ins. Code 6.14; Art. 5043 Tev. Rev. Stat. (1925), Art. 4947 (1911), Acts 1903, p. 94, unchanged, Tex. Ins. Code 21.16.

These and other provisions, including the one cited note 3, supra, are conditions upon which foreign insurance corporations are permitted to do business in Texas. Art. 5068, Tex. Rev. Stat. (1925), Acts 1903, p. 94, Art. 4972 (1911), unchanged, Tex. Ins. Code 21.43; Art. 4880, Tex. Rev. Stat. (1925), Acts 1913, p. 195, without change, Tex. Ins. Code 5.27 (Sec. 3, General Laws of the State of Texas, 33rd Leg., Ch. 106).

permit a determination that the other asserted actions did not constitute defenses.

This basic question turned on whether, at the time this policy was issued to these Assureds, the Insurer was "doing business within" Texas. If it was, Art. 5054, whose validity can no longer be open to serious question, *Griffin* v. *McCoach*, 313 U.S. 498, 85 L.ed. 1481; *Watson* v. *Employers Liability Insurance Company*, 348 U.S. 66, 99 L.ed. 74, by its terms[5] and judicial application, *Metropolitan Life Insurance Co.* v. *Wann*, 130 Tex. 400, 109 S.W. 2d 470 (1937), made the policy a Texas contract. This was, of course, a question of fact for proof.

But on the remand to the District Court, no further formal trial (before a successor Judge) was had. The cause was submitted under an express stipulation of October 31, 1955, that the case should be tried solely on the evidence admitted and judicial admissions of fact theretofore made on the initial trial resulting in the judgment of December 13, 1951, subsequently reversed by the Supreme Court.

That stipulated record did not contain evidence on which the Court could base a finding of doing business in Texas. Two years later when the Judge filed his memorandum opinion he recognized this yet went on to say "* * * but the Plaintiffs, through their attorneys, have

[5] Art. 5054, Tex. Rev. Stat. (1925), Acts 1903, p. 94, Art. 4950 (1911), unchanged, Art. 21.42 Tex. Ins. Code:

"Texas laws govern policies: Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State or at the home office of the company or corporation issuing the same."

now exhibited to the Court a certificate[6] from the Board of Insurance Commissioners of the State of Texas certifying that the defendant [Insurer] was authorized to pursue the business of certain types of insurance, including fire and marine insurance, in the State of Texas from June 1, 1948, to May 31, 1949, and contend that this Court must take judicial notice of the fact that the Defendant was doing an insurance business in the State of Texas from June 1, 1948, to May 31, 1949. This contention of the Plaintiffs is correct • • •."

But the fact that this certificate was "exhibited to the Court" long after the stipulated record had been closed, with no record indication that the adverse party was given an opportunity either to object or to refute it in fact, did not constitute the admission of it into evidence.[7] Nor was it, as the District Court stated, a matter on which the Court, in this posture, could take judicial notice.

Since the District Court's whole opinion rested on the foundation that this was a Texas contract, it is clear that the resulting judgment cannot stand in view of the absence of legally-admitted evidence on the crucial point of doing business in Texas.

This does not mean, however, that we are compelled or ought to reverse and render the cause in the Insurer's favor. The certificate of the Insurance Commissioner, while not legally received in evidence, reflects in a con-

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[6] As reflected in the record before us, this was not merely an ex parte hearsay certificate by the Chairman of the Board of Insurance Commissioners as to what had been done. It was a certified copy of the actual permit issued pursuant, so it stated, to "Chapters 11 and 18, Title 78, R.C.S., Texas, 1925." If actually offered in evidence we may assume, without deciding, that it would have been admissible as an official record. 28 U.S.C.A. 1739

[7] Indeed, the record here shows that this instrument was not filed with the Clerk until August 13, 1957, nearly two months after the final judgment had been entered and a month after Notice of Appeal and Supersedeas Bond had been filed and approved.

vincing way that there is a substantial probability that the actual fact accords with the certificate, and that evidence is available to establish this point in the proper way. In view of that, and the general approach to do substantial justice, FRCP 61, 28 U.S.C.A. 2111, we think that, as in similar situations before, this is a case in which the interests of justice require that the case be reversed and remanded for a new trial. *M. M. Landy, Inc.* v. *Nicholas*, 5 Cir., 221 F.2d 923; *Associates Discount Corp.* v. *United States*, 5 Cir., 200 F.2d 537; *City of Fort Worth* v. *United States*, 5 Cir., 188 F.2d 217.

Since the cause is being remanded to permit proof on this point, it would be manifestly unfair to allow the case to be opened up to supply deficiencies in the Assureds' proof without according to the Insurer a full and unrestricted opportunity to offer other or further evidence on this and all other phases of the case. The trial tactics and strategy of the Insurer were undoubtedly tailored to the stipulated record which was, we have held, inadequate. The result is that to enable this protracted case to be put in shape where a final decision can be reached, the cause must again be tried. On that retrial the former records may continue to be used, but both parties should be given the fullest liberty to replead, to utilize all facilities of the Rules of Civil Procedure in preparation for trial and, on the trial, offer such further evidence and testimony as each may deem advisable on any and all issues.

For like reasons it would be manifestly inappropriate for us now to forecast what those issues will be or how or in what manner they should be decided. That will, and should, be the function of the Trial Court on the record made before it on the new trial.

The cause is therefore reversed and remanded for a new trial and such other and further consistent proceedings.

REVERSED AND REMANDED.

A true copy

Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ Gilbert F. Ganucheav
Deputy

New Orleans, Louisiana
(Seal)

ORDER DENYING REHEARING

Extract from the Minutes of October 17, 1958.

FIREMAN'S FUND INSURANCE COMPANY

No. 16945 versus

WILBURN BOAT COMPANY, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * *

JUDGMENT.

Extract from the Minutes of September 18, 1958

FIREMAN'S FUND INSURANCE COMPANY,

No. 16945. versus

WILBURN BOAT COMPANY, ET AL.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial and such other and further consistent proceedings;

It is further ordered and adjudged that the appellees, Wilburn Boat Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be isesued out of the said District Court.

* * *